

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN EARL CAMPBELL,	No. C 05-05434 CW
Plaintiff,	ORDER GRANTING
v.	PLAINTIFF'S
NATIONAL PASSENGER RAILROAD	APPLICATION FOR
CORPORATION, et al.,	ATTORNEYS' FEES AND
Defendants.	NON-STATUTORY COSTS
	AND GRANTING IN PART
	DEFENDANT'S MOTION
	TO REVIEW TAXED
	COSTS

Plaintiff John Earl Campbell moves for an award of attorneys' fees in the amount of \$994,606 and non-statutory costs of \$44,702. Defendant National Passenger Railroad Corporation (Amtrak) opposes the motion. Amtrak asks the Court to review the Clerk's taxation of costs for Plaintiff. Plaintiff opposes this motion. The motions were taken under submission on the papers. Having considered all of the papers filed by the parties, the Court grants Plaintiff's motion for attorneys' fees and non-statutory costs. The Court awards attorneys' fees in the amount of \$770,596 and non-statutory costs in the amount of \$44,702. The Court grants in part Amtrak's motion to review taxed costs and denies it in part and awards Plaintiff \$12,011.93 in statutory costs.

On February 11, 2010, Plaintiff filed the fourth declaration

1 of Pamela Price requesting attorneys' fees and non-statutory costs  
2 incurred in responding to Amtrak's objections to his bill of costs  
3 and objecting to Defendant Deely's bill of costs. This declaration  
4 is not considered in this order; it will be considered separately  
5 so that Defendants may file an opposition, if they wish to do so.

6 BACKGROUND

7 On December 30, 2005, Plaintiff, represented by Price and  
8 Associates, filed suit against Defendants Amtrak and Joe Deely, an  
9 Amtrak manager and district supervisor. On February 22, 2006,  
10 Plaintiff filed his first amended complaint (FAC) alleging claims  
11 for (1) race discrimination in violation of 42 U.S.C. § 1981; (2)  
12 retaliation in violation of 42 U.S.C. § 1981; (3) retaliation in  
13 violation of California's Fair Employment and Housing Act (FEHA);  
14 (4) wrongful termination in violation of public policy; and (5) and  
15 (6) intentional and negligent infliction of emotional distress.  
16 Defendants moved for summary judgment. In his opposition to  
17 Defendants' motion, Plaintiff voluntarily dismissed his claims for  
18 intentional and negligent infliction of emotional distress. On  
19 April 3, 2008, the Court granted summary judgment to Deely on all  
20 claims and summarily adjudicated the two retaliation claims in  
21 favor of Amtrak. The Court denied Amtrak's motion with regard to  
22 the wrongful termination and failure to promote claims based on  
23 racial discrimination. A jury trial was held from February 9, 2009  
24 to March 3, 2009. The jury returned a verdict for Plaintiff,  
25 awarding him \$676,916 including \$297,716 for back pay, \$259,200 for  
26 future pay, and \$120,000 for non-economic damages. The Court  
27 granted Plaintiff's post-trial motion for re-instatement and denied  
28 Amtrak's post-trial motion for a judgment notwithstanding the

verdict or a new trial.

Plaintiff now moves to recover attorneys' fees and costs. In support of this request, Plaintiff submits time records indicating the hours billed by each attorney together with each attorney's requested billing rate and years of experience. The following is a summary of Plaintiff's attorneys' records.<sup>1</sup>

Attorney	Yrs of Experience	Proposed Rate	Hours	Fee App Hours	Total Fees
Pamela Price	26	\$750	589.75	46.65	\$477,299
Daniel De La Vega	1	\$400	384.50		\$163,412
Kendra Fox Davis	2	\$400	394.95		\$167,853
Renee Sanchez	2	\$400	273.30		\$116,152
Ok-Hee Shim	3	\$425	57.50		\$ 25,875
Grace Chung	not given	\$250		70.35	\$ 17,587
Howard Moore	47	\$625	8.5		\$ 5,312
Paralegals/ Law Clerks	Yrs of Experience	Proposed Rate	Hours	Fee App Hours	Fees
Monique Beaver		\$200	32.70		\$ 6,500
Charla Gray		\$200	47.00		\$ 9,400
George Khoury		\$200	25.70		\$ 5,140
<b>TOTAL</b>					\$994,530 <sup>2</sup>

<sup>1</sup>The information in the table is a compilation of the information in the tables included in Pamela Price's declaration, first supplemental declaration and third supplemental declaration.

<sup>2</sup>In Plaintiff's first table summarizing the fees requested for each attorney, he included \$5,312 for Mr. Howard Moore. See First Declaration of Pamela Price, Ex. G. In the updated table summarizing fees requested, Plaintiff does not include fees for Mr. Moore. See Third Declaration of Pamela Price, Ex. N. The Court assumes the omission of Mr. Moore was an oversight.

1 Plaintiff also requests a total of \$\$44,702 in costs.<sup>3</sup>

2 EVIDENTIARY OBJECTIONS

3 Amtrak objects to statements in the Price declaration. The  
4 Court has reviewed these evidentiary objections and has not relied  
5 on any inadmissible evidence. The Court will not discuss each  
6 objection individually. To the extent that the Court has relied on  
7 evidence to which Amtrak objects, such evidence has been found  
8 admissible and the objections are overruled.

9 LEGAL STANDARD

10 A district court may authorize an award of attorneys' fees to  
11 a prevailing party in a civil rights action under the Civil Rights  
12 Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Hensley v.  
13 Eckerhart, 461 U.S. 424, 429 (1983). The purpose of section 1988  
14 is to ensure that victims of civil rights violations have  
15 representation from competent counsel so that they may effectively  
16 access the judicial process. Id. A prevailing plaintiff should  
17 ordinarily recover attorneys' fees unless special circumstances  
18 would render that award unjust. Id. The exception based on  
19 special circumstances only applies in unusual cases. Mendez v.  
20 County of San Bernardino, 540 F.3d 1109, 1126 (9th Cir. 2008).  
21 Such an unusual circumstance might arise where, at the outset of  
22 the case, there was a strong likelihood of success on the merits  
23 and of a substantial judgment so that litigants with similar claims  
24 would not be dissuaded from bringing suit by the lack of

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26 <sup>3</sup>This amount is computed from Plaintiff's motion in which he  
27 requests \$39,879 in non-statutory costs, Ms. Price's second  
28 supplemental declaration stating that additional costs in the  
amount of \$1,170 were incurred, and her third supplemental  
declaration stating that additional costs in the amount of \$3,653  
were incurred.

1 availability of an award of attorneys' fees. Id. In determining  
2 whether to apply the special circumstances exception, the court  
3 must evaluate whether allowing attorneys' fees would further the  
4 purposes of section 1988 and whether the balance of equities favors  
5 or disfavors the denial of fees. Id.

#### 6 DISCUSSION

##### 7 I. Special Circumstances

8 Amtrak argues that Plaintiff's motion for attorneys' fees must  
9 be denied because Plaintiff committed perjury while testifying,  
10 which qualifies as a special circumstance that renders an award of  
11 attorneys' fees unjust. It is undisputed that Plaintiff, on direct  
12 examination by his attorney, admitted that he had testified falsely  
13 at his deposition by stating that he had not cut out the brakes of  
14 the locomotive, the safety rule violation for which Amtrak claimed  
15 it fired him.

16 In support of its argument, Amtrak cites Franchitti v.  
17 Bloomberg, L.P., 411 F. Supp. 2d 466 (S.D.N.Y. 2006)<sup>4</sup> and the  
18 dissent in Price v. Pelka, 690 F.2d 98, 101-02 (6th Cir. 1982).  
19 Amtrak acknowledges that there is no Ninth Circuit case addressing  
20 this issue.

21 Amtrak's cases are distinguishable. In Franchitti, the court  
22 addressed a motion to award attorneys' fees to a prevailing  
23 defendant where the plaintiff's case was frivolous, unreasonable,  
24 groundless and brought in bad faith. 411 F. Supp. 2d at 469. The  
25 court found that the plaintiff made up most of the events about  
26 which he testified. Id. However, the court denied the defendant's

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28 <sup>4</sup>Amtrak cites Franchitti v. Bloomberg, L.P., 411 F. Supp. 2d  
453 (S.D.N.Y. 2006), which was superseded by the above-cited case.

1 request for attorneys' fees because it, too, had dissembled at  
2 trial. Id. at 470. The denial of a defendant's attorneys' fee  
3 application would not have a chilling effect on a plaintiff's  
4 ability to obtain legal representation and access to the courts.  
5 Franchitti is not applicable to this case.

6 In Price, the court held that the plaintiff's perjury was not  
7 a circumstance that would render the award of fees unjust and that  
8 the award of attorneys' fees was necessary to avoid chilling a  
9 victim's ability to obtain competent counsel. Id. 690 F.2d at 101.

10 The dissent argued that, on equitable principles, attorneys'  
11 fees should not be awarded because the plaintiff's "deliberate and  
12 repeated falsehoods under oath" in the district court were as  
13 reprehensible as the defendants' discriminatory conduct. Id. at  
14 103-04. The dissent reasoned that an award of attorneys' fees  
15 would provide "an incentive for civil rights plaintiffs and their  
16 counsel to win cases and attorney's fees through deception and  
17 unethical conduct, thereby undermining the integrity of the  
18 judicial process." Id. at 104. The Court is not persuaded by the  
19 reasoning of the dissent.

20 In balancing the equities, the Court finds that denying an  
21 award of attorneys' fees under the circumstances here, where  
22 Plaintiff is the prevailing party in a civil rights case, would  
23 more likely chill a victim's ability to find competent counsel than  
24 undermine the integrity of the judicial process. Furthermore, it  
25 was not apparent from the beginning that there was a strong  
26 likelihood that Plaintiff would win on the merits or that he would  
27 be awarded a substantial judgment. This case was intensely  
28 litigated over the course of four years and Plaintiff's recovery of

1 damages was not certain until the jury reached a verdict.

2 Therefore, Amtrak's argument for a denial of Plaintiff's attorneys'  
3 fees based on special circumstances is not persuasive.

4 Alternatively, Amtrak argues that the rates and hours sought  
5 by Plaintiff's attorneys are not reasonable and must be reduced  
6 significantly.

## 7 II. Lodestar Calculation

8 If the court determines that an applicant is a prevailing  
9 party who should be awarded attorneys' fees under section 1988, it  
10 must next determine what fees are reasonable. In the Ninth  
11 Circuit, reasonable attorneys' fees are determined by first  
12 calculating the "lodestar." Jordan v. Multnomah County, 815 F.2d  
13 1258, 1262 (9th Cir. 1987). "The 'lodestar' is calculated by  
14 multiplying the number of hours the prevailing party reasonably  
15 expended on the litigation by a reasonable hourly rate." Morales  
16 v. City of San Rafael, 96 F.3d 359, 363 (9th Cir. 1996). There is  
17 a strong presumption that the lodestar figure represents a  
18 reasonable fee. Jordan, 815 F.2d at 1262. However, the court may  
19 adjust the award from the lodestar figure upon consideration of  
20 additional factors that may bear upon reasonableness. Kerr v.  
21 Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975).

### 22 A. Hourly Rate

23 Determining a reasonable hourly rate is a critical inquiry.  
24 Jordan, 815 F.2d at 1262 (citing Blum v. Stenson, 465 U.S. 886, 895  
25 n.11 (1984)). The fee applicant has the burden to produce  
26 evidence, other than the declarations of interested counsel, that  
27 the requested rates are in accordance with those prevailing in the  
28 community for attorneys of comparable skill and reputation. Id. at

1 1263. In establishing the reasonable hourly rate, the court may  
2 take into account: (1) the novelty and complexity of the issues;  
3 (2) the special skill and experience of counsel; (3) the quality of  
4 representation; and (4) the results obtained. Cabrales v. County  
5 of Los Angeles, 864 F.2d 1454, 1464 (9th Cir. 1988). Other factors  
6 that can be considered are (1) the time and labor required;  
7 (2) the preclusion of employment by the attorney due to acceptance  
8 of the case; (3) time limitations imposed by the client or  
9 circumstances; (4) the amount involved and the results obtained;  
10 (5) the "undesirability" of the case; and (6) awards in similar  
11 cases. Hensley, 461 U.S. at 430 n.3. These factors are subsumed  
12 in the initial lodestar calculation, and should not serve as  
13 independent bases for adjusting fee awards. Morales, 96 F.3d at  
14 363-64.

15 1. Pamela Price

16 Plaintiff seeks \$750 per hour for the services of lead  
17 attorney Pamela Price, on the ground that this is the prevailing  
18 rate for attorneys with similar skills and experience in the San  
19 Francisco Bay Area. In support of the requested \$750 per hour  
20 rate, Plaintiff submits the declarations of Ms. Price and attorneys  
21 Bill Lann Lee, William McNeill, James Finberg and John Burris.

22 Ms. Price states that she graduated from the University of  
23 California School of Law, Boalt Hall, in 1982; she then worked in  
24 public interest law firms; and, in 1991, she opened her own law  
25 firm, specializing in civil rights. Ms. Price has been a panelist,  
26 teacher and author in the area of civil rights litigation and she  
27 has been the lead counsel on many notable civil rights cases.  
28 Regarding her hourly rate, Ms. Price states that in 2001, she was



1 awarded \$375 per hour in Croskey, et al. v. Contra Costa County,  
2 C 73-0906 JCS, and, in a 2009 case that settled out of court, she  
3 requested and received a rate of \$575 per hour.

4 All three of the attorneys who submit declarations have  
5 practiced law in the Northern District of California for many  
6 years. Mr. Lee states that he has been practicing from 1974 to the  
7 present as a civil rights attorney in private practice and as  
8 Assistant Attorney General for Civil Rights in the United States  
9 Department of Justice. He states that he presently works at the  
10 Lewis Feinberg law firm where his billing rate is \$750 an hour. He  
11 states that Ms. Price is known as a skillful litigator who has a  
12 wealth of experience and knowledge in prosecuting civil rights  
13 cases and who achieves excellent results for her clients. He  
14 believes that \$750 per hour is a reasonable rate in the Northern  
15 District for a lawyer with her experience and abilities.

16 Mr. Finberg has been practicing since 1983 and, during that  
17 time, has served as an attorney in many complex class actions. He  
18 states that, in 2008, his hourly rate was \$750 and, in 2009, his  
19 hourly rate is \$775. To support his hourly rate, Mr. Finberg cites  
20 fees he received in settlements of class action lawsuits. However,  
21 class actions are distinguishable from the instant case because  
22 they are generally more complex than cases brought by one  
23 plaintiff. Mr. Finberg states that he is familiar with Ms. Price,  
24 who is known as a skillful litigator with experience and knowledge  
25 in prosecuting civil rights cases, and that he believes that \$750  
26 per hour is within the range of rates awarded to attorneys in the  
27 Bay Area with her experience and background.

28 Mr. McNeill states that he has specialized in employment

1 discrimination cases since 1973, that he has known Ms. Price for  
2 many years, working with her on some cases, and that she has  
3 exceptional knowledge of the legal issues in discrimination cases  
4 and has achieved excellent results for clients. He states that he  
5 is familiar with the rates charged by attorneys in the San  
6 Francisco Bay Area and that the rate of \$750 per hour is consistent  
7 with the market rate for senior attorneys with the length and  
8 breadth of Ms. Price's experience and reputation. Mr. Burris  
9 similarly states that he has known Ms. Price for many years, he has  
10 worked with her on a number of cases and the market rate for an  
11 attorney of her skills and expertise is as high as \$750 per hour.

12 Amtrak argues that Ms. Price should be awarded \$450 per hour,  
13 which is in line with the hourly rate set by the court in Freitag  
14 v. California Dep't of Corrections, C 00-2278 TEH. In December,  
15 2008, Magistrate Judge Zimmerman recommended an hourly rate of \$525  
16 for Ms. Price based upon her September, 2008 fee request at a rate  
17 of \$550 per hour.<sup>5</sup> Amtrak also submits Ms. Price's June 15, 2007  
18 letter to this Court, indicating that her rate was \$500 per hour.  
19 Amtrak's Exhibit Binder, Ex. H. And, Amtrak submits the  
20 declarations of Douglas A. Kahn and Dylan Carp. Mr. Kahn is an  
21 attorney with twenty-two years of experience in employment law and  
22 was selected by his peers, in 2008, as one of Northern California's  
23 super lawyers. He currently bills at \$380 per hour. Mr. Carp is  
24 one of Defendants' attorneys. He submits the resume of Patrick  
25 Mullin, who also represents Defendants. According to Mr. Mullin's  
26 resume, he has been practicing as a trial attorney since 1976 in

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27  
28 <sup>5</sup>The plaintiffs objected to the magistrate judge's order. The  
case settled, however, and the objections were withdrawn.

1 the areas of employment law, unfair competition and trade secrets,  
2 has tried over sixty cases to verdict, and lectures on trial  
3 practice. Mr. Carp states that Mr. Mullin's hourly rate is \$495.

4 The attorneys' declarations submitted by both parties support  
5 a market rate from \$380 to \$775 per hour for experienced employment  
6 and civil rights attorneys in the Northern District. In  
7 considering the Cabrales factors, the Court finds that the issues  
8 presented in this case were not especially novel or complex. On  
9 the other hand, Ms. Price's expertise and quality of representation  
10 were outstanding and the results she achieved were excellent. In  
11 regard to the Hensley factors, this litigation extended over a  
12 four-year period, and the drain on the resources of Ms. Price's  
13 small law firm was substantial, especially in the months preceding  
14 and during the trial. Finally, Ms. Price states that civil rights  
15 suits based on racial discrimination are difficult to prove,  
16 allegations of race discrimination are likely to elicit bias in  
17 jurors and, consequently, these cases are not "desirable." Many of  
18 these factors support a finding that Ms. Price should be awarded a  
19 rate that is at the high end of the market rate in her community.

20 In balancing these factors, the Court concludes that the  
21 appropriate rate for Ms. Price's work is \$700 per hour. This rate  
22 is in line with the overall market rate for experienced civil  
23 rights attorneys of similar abilities and experience in the  
24 Northern District and takes into account the difficulties  
25 encountered in representing Plaintiff.

26 2. Kendra Fox-Davis

27 Plaintiff seeks \$400 per hour for the services of attorney  
28 Kendra Fox-Davis, on the ground that this is the prevailing rate

1 for attorneys with similar skills and experience in the San  
2 Francisco Bay Area. In support of the requested \$400 per hour  
3 rate, Plaintiff submits the declarations of Ms. Fox-Davis and  
4 attorneys Michael Begert and Robert Rubin.

5 Ms. Fox-Davis states she graduated from the University of  
6 California, Los Angeles, School of Law in 2006 with a  
7 specialization in critical race studies and public interest law and  
8 policy. After graduation she was a fellow with the Lawyers'  
9 Committee for Civil Rights (LCCR), and for the last two years, she  
10 has been a staff attorney for LCCR. Ms. Fox-Davis indicates that,  
11 during the three years since her graduation, she has been co-  
12 counsel on two significant civil rights cases. She states that she  
13 was co-lead counsel on Plaintiff's case; Ms. Price states that Ms.  
14 Fox-Davis was primarily responsible for organizing, tracking and  
15 maintaining exhibits and other documents.

16 Although Ms. Fox-Davis does not indicate what hourly rate she  
17 seeks, experienced attorney Michael Begert states that \$400 per  
18 hour is commensurate with fees charged by attorneys with similar  
19 experience. Experienced attorney Robert Rubin states that he has  
20 been Ms. Fox-Davis' supervisor for three years and knows that she  
21 is an excellent lawyer and that \$400 per hour is consistent with,  
22 if not below, the market rate for an attorney having Ms. Fox-Davis'  
23 qualifications and experience.

24 Amtrak argues that Ms. Fox-Davis' fee should be \$255 per hour.  
25 It points out that no declarant states what Ms. Fox-Davis charges,  
26 and that neither Mr. Begert nor Mr. Rubin indicate what the market  
27 rate is for attorneys with three years of experience who are  
28 primarily responsible for the organizing and tracking of documents

1 during the litigation of a case. In his declaration, Mr. Carp  
2 states that Christine Young, a two-year associate at his firm, has  
3 second chaired parts of a three month jury trial and her billing  
4 rate is \$245 per hour.

5 The Court finds that the requested \$400 rate for Ms. Fox-Davis  
6 is beyond the market rate for attorneys with her level of  
7 experience. Therefore, the Court finds that a reasonable rate for  
8 Ms. Fox-Price is \$265 per hour.

9 3. Daniel Martinez de la Vega

10 Plaintiff seeks \$400 per hour for the services of attorney  
11 Daniel Martinez de la Vega. Ms. Price states that, although Mr. de  
12 la Vega graduated from law school in 2007, he acted as second-chair  
13 during the trial. He assisted Ms. Price with the pretrial  
14 preparation and trial and was primarily responsible for the  
15 witnesses, including interviews, statements and scheduling. Ms.  
16 Price states that this case was Mr. de la Vega's second trial since  
17 he graduated from law school and \$400 is the market rate for an  
18 attorney of his skill and expertise.

19 Amtrak argues that a rate of \$400 per hour is shockingly high  
20 and unreasonable for an attorney who has been out of law school for  
21 only two years. It points out that there is no evidence submitted  
22 about what his rate is or what attorneys admitted to the bar in  
23 2008 charge. It argues his rate should be \$245 per hour.

24 There is insufficient evidence regarding the reasonable market  
25 rate for an attorney with the limited experience of Mr. de la Vega.  
26 Ms. Price's declaration is that of an interested party and there  
27 are no declarations from objective witnesses. Furthermore,  
28 Plaintiff does not argue against Amtrak's suggested rate of \$245

1 per hour. The Court concludes that \$245 is a reasonable market  
2 rate for Mr. de la Vega.

3 4. Other Junior Associates

4 Plaintiff seeks a rate of \$425 per hour for the services of  
5 attorney Ok-Hee Shim, \$400 per hour for the services of attorney  
6 Renee Sanchez and \$250 per hour for the services of attorney Grace  
7 Chung. Ms. Price states that Ms. Shim graduated from the  
8 University of California, Hastings College of the Law, in 2005 and  
9 her work on this case included serving Defendants and preparing for  
10 the initial case management conference. Ms. Price believes \$425 is  
11 a reasonable rate for Ms. Shim's services and is consistent with  
12 the market rate charged by other Bay Area law firms for associates  
13 with comparable experience. Ms. Price states that Ms. Sanchez's  
14 role was limited to conducting discovery during the pre-trial stage  
15 of this case. Ms. Price states that Ms. Sanchez was admitted to  
16 practice law in California in 2006 after graduating from New  
17 College of California School of Law. Based upon her knowledge and  
18 experience, Ms. Price believes a reasonable rate for Ms. Sanchez's  
19 services is \$400 per hour. Ms. Price states, in her first  
20 supplemental declaration, that Ms. Chung is a first year associate  
21 who assisted her with the fee application. Ms. Price believes that  
22 \$250 per hour is a reasonable rate for Ms. Chung's services.

23 Amtrak argues that Plaintiff provides no evidence for the  
24 rates he seeks for these three attorneys. It argues that  
25 reasonable hourly rates for Ms. Shim and Ms. Sanchez are \$275 and  
26 \$265 respectively. Amtrak does not address the rate requested for  
27 Ms. Chung because fees for her services were first requested in Ms.  
28 Price's supplemental declaration, which was submitted after Amtrak

1 had filed its opposition.

2       Plaintiff has failed to submit sufficient evidence in support  
3 of the reasonableness of the rates requested for these three  
4 attorneys. As discussed previously, Ms. Price's testimony cannot  
5 be heavily weighed. Plaintiff has not objected to Amtrak's  
6 suggested rates for attorneys Shim and Sanchez. Therefore, the  
7 Court concludes that a reasonable hourly rate for Ms. Shim is \$275  
8 and a reasonable hourly rate for Ms. Sanchez is \$265. Because  
9 there is no evidence of a reasonable rate for Ms. Chung, the Court  
10 awards her the same rate that is awarded to Mr. de la Vega, which,  
11 as previously discussed, is \$245 per hour.

12               5. Howard Moore

13       Plaintiff seeks \$625 per hour for the services of attorney  
14 Howard Moore. In his declaration, Mr. Moore states that, since  
15 1961 when he began practicing law, he has specialized in civil  
16 rights cases and criminal defense, has litigated numerous  
17 employment discrimination cases and class actions, and has lectured  
18 on civil rights matters at many universities and professional  
19 associations. In this case, he conducted the deposition of one of  
20 the key witnesses. He states that, for the purposes of this motion  
21 only, his hourly rate for services rendered is \$625. He explains  
22 that it is lower than the rate requested for Ms. Price because he  
23 did not have responsibility as lead counsel.

24       Amtrak argues that Mr. Moore's statement, that his \$625 hourly  
25 rate is for this motion only, does not indicate what his rate  
26 actually is and whether he is charging a higher or lower rate than  
27 usual for his work on this case. It argues that his rate should be  
28 \$400 to account for his lesser responsibilities on this case.

Amtrak's argument is unpersuasive. The Court finds that an attorney of Mr. Moore's experience and knowledge is entitled to at least the \$625 per hour rate that he requests in this case.

#### 6. Paralegals and Law Clerks

Plaintiff requests \$200 per hour for the services of her paralegal and two law clerks. Ms. Price states that paralegal Monique Beaver assisted her during the discovery phase of the case, that law clerk Charla Gray worked on the opposition to Defendants' motion for summary judgment and that law clerk George Khoury assisted during the trial with preparation of exhibits and the final presentation of the case to the jury.

Amtrak argues that the rate for the paralegal and law clerks should be \$120 per hour. It bases this on the fact that, in 2003, Ms. Price's paralegal was awarded \$105 per hour in Freitag, C 00-2278 TEH, and \$120 represents a fourteen percent increase. It presents evidence that a paralegal who worked for Jackson Lewis, Defendants' law firm, bills at a rate of \$160 per hour. See Carp Dec. at ¶ 6.<sup>6</sup>

Plaintiff fails to submit sufficient evidence to support the rates requested for the paralegal and law clerks. The evidence before the Court is that one paralegal at Defendants' law firm bills at \$160 per hour. The Court will award a rate of \$160 per hour.

#### B. Number of Hours

In calculating a reasonable number of hours, the applicant

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<sup>6</sup>In its opposition, Amtrak indicates that this paralegal bills at \$120 per hour, but Mr. Carp's declaration indicates an hourly rate for the paralegal of \$160.



1 must justify his or her claim by submitting detailed time records.  
2 The court may adjust these hours downward if the documentation is  
3 inadequate, or the hours are duplicative, excessive or unnecessary.  
4 Chalmers, 796 F.2d at 1210. An upward adjustment of the lodestar  
5 is appropriate only in extraordinary cases, such as when the  
6 attorneys faced exceptional risks of not prevailing or not  
7 recovering any fees. Id. at 1212.

8 1. Block Billing

9 Amtrak argues that approximately forty-four percent of the  
10 total hours billed by the Price law firm are block-billed.  
11 It argues that the block-billed hours should be reduced by thirty  
12 percent, which would mean a thirteen percent reduction in the total  
13 number of hours billed.

14 Block billing is a time-keeping method where an attorney  
15 enters the total daily time spent working on a case, rather than  
16 itemizing the time spent on a specific task. Mendez, 540 F.3d at  
17 1129 n.2. It can be appropriate to reduce hours that are block-  
18 billed by twenty percent. Welch v. Metropolitan Life Ins. Co., 480  
19 F.3d 942, 945 n.2 (9th Cir. 2007).

20 In support of its argument, Amtrak submits the declaration of  
21 James Schratz, an attorney who specializes in auditing fee  
22 applications in fee shifting cases such as this. He identified  
23 block-billed entries as the ones in which semicolons were used by  
24 the timekeeper because, in general, the timekeepers used semicolons  
25 to separate individual tasks.

26 The entries identified by Amtrak do not meet the definition of  
27 block billing provided in Mendez because individual tasks are  
28 specified. The Court concludes that the entries Amtrak identifies

1 as block-billed are detailed enough for the Court to assess the  
2 reasonableness of the hours billed. Therefore, a reduction for  
3 block billing is not necessary.

#### 4 2. Hours Spent on Dismissed Claims

5 Amtrak argues that hours for legal services spent before the  
6 Court issued its April 3, 2008 Order on Defendants' motion for  
7 summary judgment should be reduced by fifty percent because the  
8 Court dismissed many of Plaintiff's claims in that order.

9 Where a plaintiff succeeds on only some of his claims, the  
10 court must address whether the plaintiff failed to prevail on  
11 claims that were unrelated to the successful claims. Schwarz v.  
12 Secretary of Health & Human Servs., 73 F.3d 895, 901 (9th Cir.  
13 1995). If the unsuccessful and successful claims are based on  
14 different facts and legal theories, the hours spent on the  
15 unsuccessful claims should be disallowed. Id. On the other hand,  
16 if the successful and unsuccessful claims involve a common core of  
17 facts or are based on related legal theories, the court should  
18 "focus on the significance of the overall relief obtained by the  
19 plaintiff in relation to the hours reasonably expended on the  
20 litigation," so that a plaintiff who has achieved substantial  
21 relief should not have attorneys' fees reduced because the court  
22 did not adopt each contention raised. Id.

23 As discussed above, in his FAC, Plaintiff alleged against both  
24 Amtrak and Deely two claims for emotional distress and two claims  
25 for retaliation based on his protected activity of filing  
26 complaints in which he had alleged racial discrimination in  
27 Amtrak's employment practices. Plaintiff also alleged against  
28 Amtrak alone claims of race discrimination in violation of 42

1 U.S.C. § 1981 and wrongful termination in violation of public  
2 policy. Plaintiff's § 1981 race discrimination claim was based on  
3 Amtrak's failure to promote him on six different occasions and its  
4 termination of his employment. In its April 3, 2008 Order, the  
5 Court granted judgment in favor of Deely on all claims and judgment  
6 in favor of Amtrak on the retaliation claims and five of the six  
7 failure to promote claims. Plaintiff himself moved to dismiss the  
8 emotional distress claims. After the April 3, 2008 Order, the two  
9 claims that remained were the § 1981 race discrimination claim  
10 based on Amtrak's failure to promote Plaintiff on one occasion and  
11 its termination of Plaintiff and the claim for termination in  
12 violation of public policy.

13 Fee auditor Schratz has categorized Plaintiff's attorneys'  
14 records into billings for services that occurred prior and  
15 subsequent to the April 3, 2008 Order. According to Mr. Schratz,  
16 fees and costs in the first category total \$304,005. Mr. Schratz  
17 suggests that one half of that amount be disallowed to account for  
18 the time invested in legal and factual claims that did not come to  
19 fruition and did not significantly benefit the litigation.

20 Plaintiff cites Cabrales v. County of Los Angeles, 935 F.2d  
21 1050, 1053 (9th Cir. 1991), for the proposition that, in  
22 litigation, losing is part of winning and that "a lawyer who takes  
23 on only those battles he is certain of winning is probably not  
24 serving his client vigorously enough." Also, citing Cunningham v.  
25 County of Los Angeles, 879 F.2d 481, 485-86 (9th Cir. 1989),  
26 Plaintiff argues that Amtrak's "unifactor approach" has been  
27 rejected by the Ninth Circuit. In Cunningham, the court rejected  
28 an approach in lodestar calculations that tied the number of hours

1 accepted as reasonable to the proportion of the defendants against  
2 whom the plaintiff ultimately prevailed. Id. at 486.

3 Nevertheless, the Ninth Circuit held that the district court's  
4 analysis was proper because it examined the importance of each  
5 defendant to the plaintiff's case, the claims brought against each  
6 defendant and the degree to which each factor shed light on the  
7 significance of the overall relief obtained. Id.

8 Plaintiff's retaliation claim was premised upon actions  
9 Defendants took in response to his complaints of race  
10 discrimination. His emotional distress claims were based upon race  
11 discrimination and retaliation for complaining of the  
12 discrimination. Therefore, these claims are based upon the same  
13 common core of facts as his successful race-based claims.  
14 Furthermore, all the failure to promote claims were based on a  
15 common core of facts and the same legal theories. Therefore, all  
16 of Plaintiff's claims were related and aided in the litigation of  
17 the successful race-based claims. Amtrak's argument regarding  
18 reductions for dismissed claims is unpersuasive.

19  
20 3. Excessive Conferencing and Clerical Work

21 Based upon Mr. Schratz's declaration, Amtrak argues that the  
22 total number of hours billed for inter-office conferences should be  
23 reduced. Mr. Schratz states that inter-office conferences in three  
24 large fee applications he audited amounted to two percent of the  
25 total fees requested. Thus, he postulates that two percent of  
26 total fees is a reasonable amount to bill for conferencing. His  
27 audit of Plaintiff's fee application shows that Plaintiff's  
28 attorneys attribute over six percent of their total fee request to

1 conferencing. Therefore, Amtrak urges a four percent reduction of  
2 Plaintiff's billing for conferencing. The Court does not find this  
3 methodology persuasive.  
4

5 The Court has reviewed the hours billed for conferencing and  
6 finds that they are not excessive. Therefore, no reduction is  
7 required.

8 Amtrak argues that 10.25 attorney hours that were billed for  
9 clerical tasks should be disallowed. In his audit of Plaintiff's  
10 fee applications, Mr. Schratz found 7.15 hours billed for  
11 calendaring or docketing, .10 hours billed for clerical work and  
12 three hours billed for a press release. Plaintiff does not respond  
13 to this argument.

14 Clerical and secretarial work is not compensable as attorneys'  
15 fees. Davis v. City and County of San Francisco, 976 F.2d 1536,  
16 1543 (9th Cir. 1992) vacated in part on other grounds at 984 F.2d  
17 345 (9th Cir. 1993). Thus, the calendaring, docketing and clerical  
18 work hours are not compensable. Writing a press release, however,  
19 is not clerical work and will not be disallowed as such.  
20 Therefore, 8.75 hours are disallowed as non-compensable clerical  
21 work. However, Amtrak does not indicate who billed these hours and  
22 the Court will not comb through the billing records to find them.  
23 Thus, the Court will allocate this time to a paralegal because a  
24 paralegal was the most likely to have performed clerical work.  
25  
26  
27  
28

III. Adjusted Lodestar Calculation

The following table reflects the lodestar adjustments, as discussed above.

Attorney	Rate	Hours	Fee App Hrs	Total Fees <sup>7</sup>
Pamela Price	\$700	589.75	46.65	\$445,480
Daniel De La Vega	\$245	384.50		\$ 94,203
Kendra Fox Davis	\$265	394.95		\$104,662
Renee Sanchez	\$265	273.30		\$ 72,425
Ok-Hee Shim	\$275	57.50		\$ 15,813
Grace Chung	\$245		70.35	\$ 17,236
Howard Moore	\$625	8.50		\$ 5,313
Monique Beaver	\$160	23.95 <sup>8</sup>		\$ 3,832
Charla Gray	\$160	47.00		\$ 7,520
George Khoury	\$160	25.70		\$ 4,112
<b>TOTAL</b>				\$770,596

Thus, the final total of fees awarded is \$770,596.

IV. Non-Statutory Costs

Under 42 U.S.C. § 1988, the prevailing party may recover those out-of-pocket expenses that would normally be charged to a fee paying client. Dang v. Cross, 422 F.3d 800, 814 (9th Cir. 2005).

As with attorneys' fees, an applicant seeking reimbursement of costs has the burden of providing sufficient detail to support its request for reimbursement of costs. Hensley, 461 U.S. at 437. The

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<sup>7</sup>Total fees have been rounded up or down to the nearest dollar.

<sup>8</sup>The number of hours submitted for Ms. Beaver has been reduced by 8.75 to adjust for the non-compensable clerical work.

1 requested expenses must be reasonable. Danq, 422 F.3d at 814.

2 Amtrak argues that Plaintiff's request for non-statutory costs  
3 incurred from November 1, 2005 through June 30, 2009 should be  
4 denied because it is impossible to tell from the summary of costs,  
5 submitted in Exhibit H to the Price Declaration, what actual costs  
6 he wants reimbursed. In his reply, Plaintiff argues that Exhibit H  
7 is accurate and also submits Exhibit J to the Price Supplemental  
8 Declaration, which lists the total costs billed by month. He  
9 indicates that actual costs are detailed in the monthly billing  
10 statements submitted with the first Price Declaration.

11 Plaintiff's reply explaining that the specific costs are  
12 detailed in the monthly billing statements remedies the  
13 insufficient detail in Exhibits H and J. Therefore, Plaintiff's  
14 request for reimbursement of \$44,702 in non-statutory costs is  
15 granted.

#### 16 V. Statutory Costs

##### 17 A. Legal Standard

18 Federal Rule of Civil Procedure 54(d)(1) authorizes the Court  
19 to grant the prevailing party its statutory costs. "Rule 54(d)  
20 creates a presumption in favor of awarding costs to prevailing  
21 parties, and it is incumbent upon the losing party to demonstrate  
22 why the costs should not be awarded." Stanley v. Univ. of S. Cal.,  
23 178 F.3d 1069, 1079 (9th Cir. 1999) (citing Nat'l Info. Servs.,  
24 Inc. v. TRW, Inc., 51 F.3d 1470, 1471-72 (9th Cir. 1995)).

25 The determination of taxable costs is governed by 28 U.S.C.  
26 § 1920 and, more particularly, Civil L.R. 54-3, which specifically  
27  
28

1 enumerates the standards for costs recoverable in this District.  
2 The Court may only tax costs explicitly authorized by § 1920.  
3 See Alflex Corp. v. Underwriters Labs., Inc., 914 F.2d 175, 177-78  
4 (9th Cir. 1990); see also Crawford Fitting Co. v. J.T. Gibbons,  
5 Inc., 482 U.S. 437, 442 (1987). Section 1920 permits the taxing of  
6 costs for:  
7

8 (1) Fees of the clerk and marshal; (2) Fees for  
9 printed or electronically recorded transcripts  
necessarily obtained for use in the case;  
10 (3) Fees and disbursements for printing and  
witnesses; (4) Fees for exemplification and the  
11 costs of making copies of any materials where  
the copies are necessarily obtained for use in  
12 the case; (5) Docket fees under section 1923 of  
this title; (6) Compensation of court appointed  
13 experts, compensation of interpreters, and  
salaries, fees, expenses, and costs of special  
14 interpretation services under section 1828 of  
this title.

15 B. Analysis

16 As a prevailing party, Plaintiff filed a Bill of Costs  
17 totaling \$15,376.14. After disallowing several items, the Clerk  
18 taxed costs for Plaintiff in the amount of \$12,444.89. Amtrak  
19 challenges the Clerk's taxation of fees for service of subpoenas,  
20 deposition transcripts, witness fees, copies and expenses incurred  
21 by Plaintiff's counsel to depose Timothy Sheridan. It does not  
22 challenge the Clerk's taxation of \$250.00 for the docket fee.

23 1. Fees for Service of Subpoenas

24 The Clerk awarded Plaintiff \$630.00 for fees for service of  
25 subpoenas. Of this total, Amtrak objects to \$150.00 for the  
26 attempted service of process on Steve Shelton on the basis that,  
27 because he is an Amtrak employee, a subpoena was not necessary. In  
28



1 addition, Amtrak objects to \$115.00 for service of process on Ryan  
2 Peterson because he did not appear at trial or at any deposition.  
3

4 Plaintiff maintains that service of process on Mr. Shelton was  
5 necessary because Amtrak refused to agree to produce him for  
6 February 9, 2009, the first day of trial. He provides a letter  
7 from Amtrak's counsel, which states that if Plaintiff sought to  
8 have Mr. Shelton testify on either the first or second day of  
9 trial, he would have to serve Mr. Shelton personally. Amtrak did  
10 not file a reply to Plaintiff's opposition and, accordingly, did  
11 not respond to Plaintiff's proffer of this letter. Based on this  
12 letter, it appears that the subpoena of Mr. Shelton was required.  
13

14 With regard to Mr. Peterson, Plaintiff asserts that he was a  
15 potential third-party witness who could have been called at trial.  
16 Even though he was not called, it was necessary to serve him in  
17 case his testimony was needed.

18 Because Amtrak does not show that service of process on these  
19 individuals was not necessary, the Court does not modify the  
20 Clerk's award of \$630.00 for service fees.

21 2. Fees for Deposition Transcripts

22 Noting that Plaintiff only partially prevailed in this action,  
23 Amtrak asks the Court to reduce his award for deposition  
24 transcripts by two-thirds. However, Amtrak does not explain how it  
25 reached this figure, except to say that the "depositions were  
26 pertinent at least in part to the claims on which Defendants  
27 prevailed" and that a reduction by two-thirds accounts "for Mr.  
28

1 Deely's complete success and Amtrak's partial success." Mot. at 2.

2 As discussed above, all of Plaintiff's claims were related and  
3 aided in the litigation of the successful race-based claims.

4 Accordingly, the Clerk's award for deposition transcripts remains  
5 unchanged. Plaintiff is awarded \$7,986.20<sup>9</sup> for the cost of  
6 deposition transcripts necessarily obtained for use in this case.

8 3. Witness Fees and Expenses

9 Amtrak argues that Plaintiff waived recovery of costs for  
10 Tashea Campbell because he failed to make a timely claim. Civil  
11 Local Rule 54-1(c) provides that a party waives costs if they are  
12 not claimed within fourteen days from the date judgment enters.  
13 Although judgment entered on October 9, 2009, Plaintiff did not  
14 claim costs for Ms. Campbell until November 20, 2009. Because he  
15 did not claim Ms. Campbell's costs in accordance with Civil L.R.  
16 54-1, the Court disallows Plaintiff's recovery for her expenses.

17 With regard to Chris Clipper, Mark Schulthies, Richard Barnes,  
18 Mary Gotthardt and Richard Barrows, Amtrak asserts that Plaintiff  
19 can recover no more than forty dollars per day for witness fees.  
20 This is incorrect. Although witnesses are paid a forty dollar  
21 attendance fee for each day they attend trial proceedings, they are  
22 also entitled to reimbursement for their actual travel expenses to  
23 the court's location and to payment of a subsistence allowance when  
24

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25  
26 <sup>9</sup> The Clerk disallowed \$2,688.74 from Plaintiff's claim of  
27 \$10,674.94 for deposition transcript costs, which should have  
28 reduced his claim to \$7,986.20. However, the Clerk taxed \$7,886.20  
for such costs. (Docket No. 321.) The Court accounts for this  
inadvertent arithmetic error here and in its calculations below.

1 an overnight stay is necessary. 28 U.S.C. § 1821; Civil L.R. 54-  
2 3(e). These costs are taxable. See id. §§ 1821(c)(4) and 1920(3);  
3 Civil L.R. 54-3(e).  
4

5 Plaintiff has proffered sufficient documentation to support  
6 the recovery of expenses for Chris Clipper (\$474.54), Mark  
7 Schulthies (\$227.33), Richard Barnes (\$193.99) and Mary Gotthardt  
8 (\$105.89); Amtrak does not argue that these expenses were  
9 unreasonable. The Court therefore does not disturb the Clerk's  
10 calculation of costs for these witnesses. However, Plaintiff has  
11 not provided sufficient documentation as to the one-day appearance  
12 of Richard Gaylin Barrows. Plaintiff only offers a check stub  
13 dated March 26, 2007 for what appears to be costs attributed to Mr.  
14 Barrows's deposition; no further explanation is provided. Because  
15 Plaintiff has not provided documentation to show that these costs  
16 were taxable, the Court reduces Mr. Barrows's costs to \$40, the  
17 attendance fee available under section 1821.  
18

19 Accordingly, the Court awards Plaintiff witness costs in the  
20 amount of \$1,041.75.

21 4. Copying Costs

22 Amtrak asserts that Plaintiff's award for copying costs should  
23 be reduced by two-thirds because he only partially prevailed in  
24 this action. For the reasons stated above, the Court declines to  
25 reduce his award. Accordingly, the Court taxes copying costs in  
26 the amount of \$2,103.98.  
27  
28

## 5. Costs for Counsel's Travel to Depose Witness

The Clerk taxed \$238.96 for expenses incurred by Plaintiff's counsel to travel to Seattle, Washington to depose Tim Sheridan. However, Civil Local Rule 54-3(c)(2) does not permit the taxing of the expenses of counsel to attend depositions. Accordingly, the Court disallows Plaintiff's claim in the bill of costs for his counsel's travel to Seattle.

In summary, the Court disallows Plaintiff's claims for Tashea Campbell's witness expenses and his counsel's travel costs to depose Mr. Sheridan. The Court reduces Mr. Barrows's witness expenses to \$40. Accordingly, the Court awards Plaintiff \$12,011.93 in costs, as follows: \$630.00 for service of subpoenas; \$7,986.20 for deposition transcript costs; \$1,041.75 for witness fees and expenses; \$2,103.98 for copying costs; and \$250.00 for the docket fee.

## CONCLUSION

For the foregoing reasons, Plaintiff's motion for an award of attorneys' fees and costs is granted (Docket # 267) and Amtrak's motion for review of taxation of costs is granted, in part (Docket # 323). Attorneys' fees are awarded in the amount of \$770,596, non-statutory costs are awarded in the amount of \$44,702, and statutory costs are awarded in the amount of \$12,012. Amtrak shall pay these amounts forthwith. If Defendants wish to file an opposition to Plaintiff's request for additional fees and non-statutory costs as stated in Ms. Price's fourth supplemental

1 declaration, they must do so within two weeks from the date of this  
2 order. If Plaintiff wishes to file a reply, he may do so one week  
3 thereafter. Plaintiff's request for additional fees and non-  
4 statutory costs will be taken under submission.  
5

6  
7 IT IS SO ORDERED.

8 Dated: February 18, 2010



\_\_\_\_\_  
CLAUDIA WILKEN  
United States District Judge